Indiana Department of Education

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RECENT DECISIONS

Recent Decisions is an annual communication from the Legal Section of the Indiana Department of Education to the Indiana State Board of Education, the Indiana Board of Special Education Appeals, Administrative Law Judges/Independent Hearing Officers, Mediators and other constituencies involved in or interested in publicly funded education. Full texts of opinions cited or documents referenced herein may be obtained by contacting Kevin C. McDowell, General Counsel, at (317) 232-6676 or by writing to the address listed above.

In this Issue:

GRADUATION EXAMINATION AND REASONABLE ACCOMMODATIONS

Indiana 10th grade students participated on September 22-24, 1997, in the initial administration of the graduation qualifying examination as a part of the Indiana Statewide Test of Educational Progress (ISTEP+). Students will have to pass the graduation examination, complete the Core 40 curriculum under criteria adopted by the State Board of Education, or successfully appeal adverse test results in order to receive a high school diploma. Attachment A is the Indiana State Board of Education's new rule governing the appeal process required by I.C. 20-10.1-16-13(c), (d). However, it will be several years before a student can utilize the appeal process. A more immediate concern was defining the extent to which reasonable accommodations could be employed for students with disabilities without altering the reliability of the examination. A reasonable accommodation is to be determined individually, and would generally include accommodations used in classroom testing situations. A reasonable accommodation would not provide an unfair advantage. But an accommodation that alters what is measured would be a "modification" of the test and would not be permitted. The distinction between "reasonable accommodation" and "modification" can become blurred. The following are reported cases or administrative decisions, involving accommodations for high stakes examinations, which provide some guidance in determining reasonable accommodations.

1. Price et al. v. The National Board of Medical Examiners, 966 F.Supp. 419 (S.D. W. Va. 1997). The three plaintiffs in this case were all medical students who claimed to have Attention Deficit Hyperactivity Disorder (ADHD) and specific learning disabilities. They requested additional time and a separate room when participating in the United States Medical Licensing Examination (USMLE). Their claim was based upon a provision of the Americans with Disabilities Act (ADA) which, at 42 U.S.C. §12189 requires, in pertinent part, that "Any person that offers examinations...related to applications, licensing, certification, or credentialing for...professional...purposes shall offer such examinations...in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."[1] The plaintiffs' applications were reviewed by the National Board but were rejected because their disabilities did not significantly restrict one or more major life activities. The plaintiffs had above-average academic performance when compared to the population as a whole. Except for one plaintiff, the plaintiffs had never required accommodations in the past. The mere existence of a disability does not entitle one to any specific accommodation, the court noted. Under the ADA, the court added, whether or not one has a substantial limitation on a major life activity, such as learning, depends upon one's performance

[1]The reauthorized Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. §1412 (a)(17) requires that children with disabilities "be included in general State and district-wide assessment programs, with appropriate accommodations, where necessary." Alternate assessment can be developed for students whose disabilities would preclude participation in the State or district-wide assessments, even with accommodations.

compared to the population as a whole and is not dependent upon individual discrepancies between one's expected performance and actual achievement.

> An impairment substantially limits a person's major life activity when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed *in comparison to most people in the general population.*

966 F.Supp. at 422 (emphasis original). A person may be medically or psychologically assessed as having a disability, but this does not mean the individual is disabled under the ADA. Id., at 427.

> If a court were to grant testing accommodations to persons that do not have disabilities within the meaning of the ADA, it would allow persons to advance to professional positions through the proverbial back door.

Id., at 422. The court specifically disagreed with the decision in Pazer v. New York State Bd. of Law Examiners, 849 F.Supp. 284 (S.D. N.Y. 1994), which applied a standard of "disparity between inherent capacity and performance on a test" in determining whether an individual has a disability requiring accommodation "even though that individual's performance has met the standard of an ordinary person." 849 F.Supp. at 287. However, the Pazer court noted that such individual disparity does not compel a finding of a disability as a matter of law. "Indeed, to hold otherwise would compel the conclusion that any underachiever would by definition be learning disabled as a matter of law." Id. Nevertheless, the Pazer court found against the law student who sought the following accommodations while taking the bar examination for an alleged visual processing disability: four days to take the test rather than two days; the use of a computer with word processing, spell checking, and abbreviation expanding software; permission to record his answers to the multiple choice portion of the examination in the test book; and a separate room in order to minimize distractions.

2. Texas Education Agency (TEA), 23 IDELR 566 (OCR 1995). The Office for Civil Rights (OCR) found that the TEA's refusal to modify its statewide assessment for students with disabilities who do not require special education violated Sec. 504 of the Rehabilitation Act of 1973. TEA agreed to provide modifications where necessary and agreed also that TEA--not the student--bears the burden of proof where it is asserted modifications would affect the validity of test. See also Texas Education Agency, 16 EHLR 750 (OCR 1990) where OCR upheld TEA's modifications, accommodations, remediation, and retesting efforts on behalf of students in special education.

3. Austin (TX) Independent School District, 25 IDELR 253 (OCR 1996). This is a continuation of previous civil rights concerns raised regarding the administration of the Texas Assessment of Academic Skills (TAAS). In this case the student alleged

violations of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act when the school district would not permit him to use a calculator while participating in the TAAS. The student was eligible for special education services. His individualized education program (IEP) did not exempt him from participating in the TAAS but did describe certain modifications necessary for the student. However, the use of a calculator was not one of the modifications, even though it had been identified and provided the previous year. Because the student's IEP did not include the use of a calculator as a necessary modification, the school district did not discriminate against the student on the basis of disability when it would not permit the student to use a calculator while participating in the TAAS.

4. Nevada State Department of Education, 25 IDELR 752 (OCR 1996). The State developed with CTB/McGraw-Hill a minimum proficiency test, which is administered in the 4th, 8th, and 11th grades. The 11th grade test must be passed to obtain a standard high school diploma. Students have several opportunities to pass the test; but if they do not, they receive a "Certificate of Completion." Students receiving special education can be exempt from participation and receive, instead, an "adjusted diploma." The test is designed to test basic competencies, and the pass score is set at a relatively low level (16th percentile). State guidelines permit a wide variety of accommodations for students with disabilities. However, for the mathematics section—which has 45 multiple choice questions with 45 minutes to complete—accommodation can include additional time (up to twice the normal time), but the use of calculators for this section is prohibited. In addition, an appeal to the State can be made. Two such appeals were made, but both were denied. No student denied the use of a calculator has failed the math section. The State's rationale for prohibiting the use of calculators is that to permit their use would change the nature, content, and integrity of the math section. Further, the ability to calculate is the skill being assessed although the math section is not designed to focus solely on the ability to perform calculations. OCR did not find this practice in violation of Sec. 504 or Title II, ADA, because: (1) the State makes accommodations available, (2) there is a method for granting exceptions to its policy prohibiting the use of calculators on the math section of its exit examination, (3) the pass score is set at a relatively low level, (4) students have multiple opportunities to take the test, and (5) no students have failed the test due to the State's refusal to permit the use of a calculator as an accommodation.

5. Rockwall Independent School Dist., 21 IDELR 403 (SEA TX. 1994). The parent initiated a due process hearing under IDEA, alleging that the school failed to timely identify the student's "other health impairment"(OHI)—blood disorder, heart condition, and epilepsy resulting from a head injury— and should have exempted her from participation in TAAS. The impartial hearing officer (IHO) found that the student's OHI could not have been determined any earlier because of uncertainty of the medical diagnosis by physicians. The student's below-average grades alone did not make her eligible, and it was reasonable for the school district to believe the student could pass the TAAS based on past academic assessment. If the student cannot pass the TAAS (in this case, the mathematics portion), exemption could be considered by her IEP team, and an alternative graduation plan could be devised. The student's inability to pass the TAAS,

coupled with her numerous health-related absences, resulted in her not graduating with her class. IDEA requires the provision of a "free appropriate public education" (FAPE). FAPE does not include a guarantee a student will graduate timely or at all.

6. Huntsville City Board of Education, 21 IDELR 767 (SEA Ala. 1994). The parents initiated a due process hearing under IDEA to challenge the school district's refusal to provide a reader for an 18-year-old student with a specific learning disability who had failed four times the language portion of the Alabama High School Graduation Examination (AHSGE). The student had passed the reading comprehension and mathematics portion of the AHSGE on his first attempt. The IHO found that the student did not require a reader as a reasonable accommodation for the language portion of the AHSGE. The IHO's decision was based on the following facts:

    a. Although the student has an identified learning disability in reading, he passed the more difficult reading comprehension portion of the AHSGE on the first attempt and has been within one or two points of passing the language portion.

    b. The student has satisfied all other graduation requirements without the need for a reader as a reasonable accommodation.

    c. None of the student's IEPs has included the need of a reader as a reasonable accommodation or related service.

    d. The AHSGE is a criterion-referenced test rather than an norm-referenced. The student's score, then, reflects his actual mastery of certain specific skills and is not a comparison of his skills to other students. (Indiana's graduation examination is criterion-referenced. However, the ISTEP+ for grade 10 includes both criterion-referenced and norm-referenced items involving mathematics and English/language arts.)

    e. "The evidence of the Child's amotivation and disinterest in remediation in the areas in which he believes he has already mastered is a consistent part of the explanation of his failure." 21 IDELR at 772.[2]

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[2]Alabama state policy militated against reading accommodations on the exit examination "if a student had not received a reading accommodation in the last two years of his education." 21 IDELR at 770. Although not at issue in this hearing, the IHO questioned the legality of such

7. Birmingham Board of Education, 20 IDELR 1281 (SEA Ala. 1994). This case involved a direct challenge to Alabama's policy that reading accommodations would be permitted only where the student's previous two IEPs required this. The student's IEP Team had determined that the student, who had a learning disability in reading, English, and mathematics, should participate in the AHSGE and would have all parts of the test read aloud to him except the reading subtest. The State Department of Education (SDE) informed the school district of its policy. The parents initiated a due process hearing under IDEA to challenge SDE's policy restricting reading accommodations. The IHO ruled in favor of the parents, finding SDE's policy inconsistent with IDEA and with the role of the IEP Team. It is the IEP team which best knows a student's individual needs, and it had previously identified this student's need for oral examinations.

LEGAL SETTLEMENTS: TEMPORARY DISRUPTION

Although "legal settlement" of a student is defined at I.C. 20-8.1-1-7.1 and I.C. 20-8.1-6.1-1, resolution of these disputes by the Indiana State Board of Education (SBOE) are usually fact sensitive. This past year, however, the SBOE had to consider intent of the parties in resolving a dispute. In the Matter of C.K., C.K., K.K. and the Northwestern School Corporation of Howard County, Cause No. 9608011 (SBOE 1996; Dana L. Long, Hearing Examiner) involved a family which had lived in the school district since 1983. Although the parents eventually divorced, the three children continued to reside with their mother in the school district. The mother purchased property within the school district with the intent to build a new house. Construction commenced and was to be concluded by August of 1996. In the meantime, the mother sold her current house. Unfortunately, due to weather conditions, the new house was not completed until the end of September, although it was 75 percent completed when school began. The mother could not locate temporary housing within the school district, but did manage to rent an apartment which happened to be located in a neighboring school district. Despite the history of legal settlement within the school district and the nearly completed home, the school district required the mother to pay cash transfer tuition, claiming she no longer had legal settlement within the school district.

Noting that the school district included the three school-aged children in its pupil count for State funding, the mother continued to pay property tax in the school district, and the mother never intended to leave the school district, the SBOE ordered the school district to reimburse the mother for the tuition paid and found the three students continued to have legal settlement within the school district. The decision is included herein as Attachment B. The discussion section explains intent and addresses equity issues raised by this dispute.

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a policy, adding that accommodations are determined by the IEP team on an individual basis. Id., at 771.

LEGAL SETTLEMENT: GROUP HOMES

M. S. D. of Southwest Allen County v. Allen County, Cause No. 9512026 (SBOE 1997; Kevin C. McDowell, Hearing Examiner) is an interesting case from the standpoint that the SBOE does not recognize residency within a group home as establishing legal settlement. The opinion (see Attachment C) involves a dispute which arose during the 1993-1994 school year when counties were still responsible for the payment of transfer tuition for students placed in state-licensed private or public health care or child care facilities or foster homes by the counties.[3] The eight students in question had legal settlement within the county but not within the boundaries of the school district. The county was ordered to pay to the school district $101,448.72 in transfer tuition plus an eight percent penalty.[4] The county's counterclaim was also dismissed.

As noted in Recent Decisions 1-12:94, the SBOE considers attorney fee requests under I.C. 20-8.1-6.1-11(c) separately as a supplemental procedure. On August 7,1997, the SBOE awarded the school district $11,104.54 in attorney fees and costs. The county has sought judicial review.

TRIENNIAL EVALUATIONS AND SPECIAL EDUCATION

The Individuals with Disabilities Education Act (IDEA) requires that each student with a disability who requires special education be evaluated at least once every three years, or more frequently should conditions warrant.[5] See 34 CFR §300.534(b). The Indiana State Board of Education's rule reflects the federal requirement. See 511 IAC 7-10-3(o). The regulations for triennial evaluations do not include any exceptions or any specific right of a parent, guardian, or the student to avoid the evaluative process. This became the focal issue in Johnson v. Duneland School Corporation, et al. , 92 F.3d 554 (7th Circuit 1996).

The student had significant medical problems, including seizure activity, leukemia, and mental retardation. His medical condition resulted in his being placed on homebound instruction. However, as medication stabilized his condition, his physician recommended he again attend school. The school sought to reevaluate the student and asked the parents for a release of medical information. Instead the parents sought a due process hearing challenging the school's proposed program and seeking reimbursement for an independent evaluation obtained by the

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[3]I. C. 20-8.1-6.1-5(a) now requires the school corporation of legal settlement to assume financial responsibility for the transfer tuition of such students

[4]I. C. 20-8.1-6.1-11(c) was amended in 1994, removing the penalty provision in favor of "interest as provided by law." The amendment was not effective during the time frame for this dispute

[5]The reauthorized Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. §1414(a)-(c) maintains the triennial evaluation requirement but does relax this requirement where existing data support continuing eligibility for special education services.

parents. The parents did not raise the triennial evaluation as an issue nor did they challenge the propriety of the proposed evaluation. A number of due process issues were raised during the hearing, before the Indiana Board of Special Education Appeals, and upon judicial review in the federal district court (see **Quarterly Report** July - Sept.: 95). However, most of these issues were not raised in the appeal of the district court's decision to the 7th Circuit Court of Appeals.

On appeal, the 7th Circuit addressed only one issue while affirming the district court's grants of summary judgment to the school and other defendants: whether the school has an absolute right to conduct a three-year reevaluation.

The 7th Circuit joined other circuit courts in holding that schools have a right to conduct the three-year reevaluation. The court reasoned that "because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation of the student and the school cannot be forced to rely solely on an independent evaluation conducted at the parents behest." At 558. Parental consent is not required under such circumstances. Id.

The court, relying upon a decision from the 5th Circuit (see below), also rejected the proposition that there is an exception to the school's right to reevaluate based upon alleged medical and psychological harm to the student should the evaluation occur. The 7th Circuit did not characterize the school's right as "absolute," as other courts have done. A school's right to reevaluate, the court noted, is balanced in Indiana with the parent's right to challenge through the due process hearing process any proposed evaluation by the school. But where a parent does not raise this as an issue, as in the case, the school's right is "absolute." Id.

Two other cases involving the school's right to conduct the triennial evaluation are as follows:

1. Andress v. Cleveland Independent School Dist., 64 F. 3d 176 (5th Cir. 1995). This is the principal case relied upon by the 7th Circuit relied upon. The student was identified as having a learning disability. He was hospitalized following hazing incidents which became physical assaults. When discharged from the hospital, he received homebound instruction. The school sought to conduct the three-year reevaluation, but the parents opposed this because they believed any further assessments would traumatize the student. Instead, the parents obtained independent evaluations, but these did not meet the requirements of state law. As a consequence, the school could not rely upon the results. A due process hearing officer held this school could not be compelled to accept the independent assessments in lieu of completing its own reevaluation. The 5th Circuit upheld the hearing officer, reversing the district court's finding that there could be supervening reasons for preventing the school from conducting its reevaluation. The 5th Circuit held "that there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA."

2. Doe v. Phillips, 20 IDELR 1150 (N.D. Cal. 1994). This case was cited by the Andress court, and is similar to the underlying facts in that case. The parent provided the school with results of independent evaluations, but refused to permit the school to evaluate her

son, claiming the possibility that any further assessment by the school would traumatize the student. A due process hearing officer did not agree and neither did the federal district court. The school had the right to assess the student using its own personnel.

CONSENSUS OF OPINION AT CASE CONFERENCE COMMITTEES

A case conference committee has a range of responsibilities under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., 34 CFR Part 300 and its Indiana counterpart, 511 IAC 7-3 et seq. (Article 7), including the responsibilities for the determination of eligibility for special education services, development of an individualized education program (IEP), and implementation of the IEP in the least restrictive environment (LRE) in order to ensure the student receives a free appropriate public education (FAPE). However, neither federal nor state law addresses how a case conference committee reaches conclusions involving the issues of eligibility, identification, placement, and any aspect of FAPE. The Indiana Department of Education has long encouraged such decisions to be reached by consensus among the case conference membership. No one should exercise "veto power" and vote-taking should be avoided. Taking a vote among the participants is an inherently divisive maneuver which often invites retaliation in some form.

Whether or not consensus has been achieved with respect to any particular matter is a responsibility of the case conference committee coordinator. If the parent disagrees, the parent may withhold written permission for placement or request a due process hearing. If the school disagrees, it may request a due process hearing. These procedural safeguards are in place in order to balance the relative positions of the two main participants (the parents and the school). Indiana has the added procedural safeguard requiring written parent permission for initial placements and all subsequent changes of placement. 511 IAC 7-12-1(p).

The Office Special Education Programs (OSEP) of the U.S. Department of Education acknowledged in a 1981 letter that federal law is silent in this respect, but added that "majority rule" would "be a reasonable manner in which to proceed." Letter to Coleman, EHLR 211:269 (OSEP 1981).

The method of decision-making in a case conference committee was a core issue in Hawes et al. v. Plymouth Community School Board et al., 24 IDELR 1018 (N.D. Ind. 1996). Hawes involved three due process hearings and administrative reviews (Art. 7 Hearings Nos. 697-93, 751-94, and 851-95). There were also three complaint investigations under 511 IAC 7-15-4. The parents and the school had originally agreed to a home-based instructional program through the mediation process under 511 IAC 7-15-3. However, a mediation agreement must be submitted to the student's case conference committee for approval under 511 IAC 7-15-3(e). The case conference committee rejected the mediation agreement because the placement was too restrictive. The case conference recommended a program in the local public high school. In the subsequent hearing (Art. 7 Hearing No. 697-93), the Independent Hearing Officer (IHO) found the school-based program appropriate. The Board of Special Education Appeals (BSEA) upheld

the IHO's decision. The parents placed the student in a nonaccredited, nonpublic school, but did not seek judicial review. The parents initiated two subsequent hearings, but did not seek judicial review of those decisions. The parents eventually initiated a civil rights action, which listed a host of alleged violations. During this time, the parents initiated a fourth due process hearing (No. 891-96). The district court granted judgment in favor of all school and State defendants.

Relying upon Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), the district court held "that majority rule voting is inappropriate in an IEP meeting... [W]hile a consensus between the school officials and the parents is ideal, if no consensus is reached, 'the agency has the duty to formulate the plan to the best of its ability in accordance with the information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan.'" 24 IDELR at 1022, citing Doe v. Maher, 793 F.2d at 1490.

The court noted that the parents were provided ample opportunity to be involved in the case conference committees involving the student and took advantage of these opportunities, including attempting to institute their own "specific voting procedures." However, contrary to the parents' representations, no consensus was ever reached. "[I]f no consensus is reached, the local educational authority must prepare the IEP, which it has done. The Hawes have the right, and have exercised the right, to go to a due process hearing if they disagree with the IEP. The decision-making process within the case conference committee exercised by [the school] does not violate the procedural protection of the IDEA." Id. The court also upheld the determination that mediation agreements lack legal effect until the case conference committee approves the agreement.

Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), the case relied upon by the Indiana federal district court, bears elaboration. Doe involved discipline under special education and is better known by its U.S. Supreme Court caption, Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592 (1988). However, the 9th Circuit's observations on decision-making within the IEP team were not reviewed by the Supreme Court. The following are relevant points made by the 9th Circuit:

> The defendants challenge vigorously the district court's ruling that when an IEP team convenes to review proposed changes in placement in response to misconduct, decisions shall be made by majority rule. They argue instead that such decisions are to be made by consensus. The parties raise a fundamental issue to which, surprisingly, there is no clear answer.
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> The majority-rule view draws no express support from any relevant authorities. Moreover, such a policy seems inconsistent with the liberal provisions for expansion of IEP team membership. The regulations, to illustrate, provide that either parents or the agency may, at their discretion, invite additional persons to attend IEP meetings. See 34 CFR §300.344 (1985). This eliminates a key prerequisite to the utilization of majority rule, *viz.* a body

having a fixed and specific number of members during the pendency of the issue sought to be resolved. Majority rule with a floating membership would encourage both sides in an IEP dispute to attempt to "stack the deck" by inviting numerous additional participants who shared the same views. It is inconceivable to us that Congress intended such a result. Therefore, we reverse the district court's judgment regarding majority rule.

A question remains, however, as to what principle of decision making should be employed. Decision by consensus has little utility with respect to issues whose intensely emotional nature makes reconciliation impossible. Perhaps the local educational agency has the power, after consulting with other IEP team members, to resolve any IEP issue that arises after an initial placement. In natural opposition to this position stands the interests of the parents. Although the [IDEA] clearly envisions an active participatory role for parents in the placement process [citations omitted], the Act nowhere explicitly vests them with a veto power over any proposal or determination advanced by the educational agency regarding a change in placement.

Despite its questionable utility for dealing with strongly contested issues, the consensus principle is supported by the [IDEA's] implementing regulations and their accompanying comments.

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However, the Supreme Court's opinion in *Burlington School Committee v. Department of Education,* 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), qualifies the "consensus" inference. In discussing parents' participatory role in developing IEPs for their children, the Court observed that Congress, "[a]pparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any dispute the school officials would have a natural advantage, ... incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Id.*, 105 S.Ct. at 2002.

We construe the Court's language as a recognition that, although the formulation of an IEP is ideally to be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. If the parties reach a consensus, of course, the [IDEA] is satisfied and the IEP goes into effect. If not, the agency has the duty to formulate the

> plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan. [Citations omitted.] Similarly, the parents have a right to a due process hearing should they believe that the IEP drafted by the local agency conflicts with the consensus reached at the meeting.
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> ...
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> We emphasize that parents may seek review of any decision they dislike and that, during the pendency of any such review proceedings, the child will remain in his or her current placement if the parents so desire.

Id., at 1488-1490.

CHILD FIND AND PARENTAL RESPONSIBILITY

In Sanders v. DeKalb County Central United School District et al., 26 IDELR 257 (N.D. Ind. 1996), the plaintiffs sought judicial review of Article 7 Hearing No. 811-95, asserting that the IHO and the BSEA erred by not finding the school district in violation of the child find procedures (see 511 IAC 7-10-1) by not identifying the student's disability. The plaintiffs also asked the court to find intentional discrimination under Sec. 504 of the Rehabilitation Act of 1973. The court noted that "child find" is a requirement under IDEA, but neither federal statute nor regulation details how this is to be accomplished (26 IDELR at 258-59). There were a number of vague or otherwise nonspecific references to possible Attention Deficit Hyperactivity Disorder (ADHD), which the school did set about to accommodate through various modifications to programs. Nevertheless, academic performance was inconsistent and the student's behavior began to deteriorate. He became defiant and refused to do his work or to follow directions. Suspensions followed. He was to be expelled following gang-related activity. He withdrew from school prior to expulsion in exchange for expungement of his record. The student was referred for a special education evaluation under 511 IAC 7-10-3 prior to reenrollment in the summer of 1994. The psychologist's report and subsequent case conference committee did not find him eligible for special education services as a student with a learning disability. Nevertheless, the case conference did discuss intervention strategies to be employed with the student. The school continued to attempt to accommodate him during the 1994-1995 school year. His non-compliant and defiant behavior continued. He was transferred to the alternative school at the beginning of the second semester. He withdrew from the alternative school to avoid expulsion and possible criminal prosecution for the possession of marijuana. In February 1995, the plaintiffs requested a due process hearing, raising five issues (26 IDELR at 261). A mediation was conducted in April of 1995, where the school received from the plaintiffs for the first time a definitive medical diagnosis of ADHD, although the plaintiffs had been in possession of the report prior to requesting the due process hearing. The school agreed to meet within the context of a case conference to discuss evaluative data and determine whether the student has an emotional handicap (EH) or is "other health impaired" (OHI). A "diagnostic

placement" at the alternative school was proposed, with a working educational diagnosis of OHI/EH. When a hearing was conducted, the plaintiffs did not challenge the current proposed diagnostic placement but dwelt upon past alleged failures of the school to identify the student's disabling condition. The IHO ruled against the plaintiffs on the five issues, and the BSEA sustained. The court, in upholding the IHO and the BSEA, found the school's "child find" practices adequate. The court declined to accept the plaintiffs' assertion that the school should have known of the student's disability from 1990, although the plaintiffs admitted themselves they did not suspect a disability until April of 1994. The court added that the school had not refused to evaluate the student for a suspected disability upon parental request, and further added that a parent may have an *initial* responsibility to identify a potential problem and then request assistance (Id, at 263). The court also noted that even at the writing of the decision, it is not clear what—if any—special education services the student may require or for which he may be eligible. The court also noted that "mere symptoms of ADD" are not sufficient to trigger IDEA child find procedures. The court observed also that there was "overwhelming evidence presented to the IHO" that the student's behavior was not causally related to his ADHD (Id., at 264).

The BSEA recently reviewed a situation somewhat similar to Sanders. In In the Matter of M.S. and the Eagle-Union Community School Corporation, 26 IDELR 106 (BSEA 1997), the parent alleged the school failed to timely identify the student's disability. However, the evidence at the hearing (Art. 7 Hearing No. 941-97) indicated the school attempted to obtain written parental permission to evaluate but the parent refused. The parent also would not provide medical records to the school. After the IHO ruled in the school's favor, the parent appealed to the BSEA. During the appeal the parent attempted to submit medical documents not shared during the hearing. The BSEA declined the proffered documents because they were not "newly discovered evidence." See I.C. 4-21.5-3-31(c) and Recent Decisions 1-12:94. As in Sanders, the BSEA noted that a parent does bear some responsibility in seeking services for the parent's child. (This decision can also be viewed on-line at *ideanet.doe.state.in.us/legal/*.)

EXPULSION PROCEEDINGS UNDER I.C. 20-8.1-5.1

The 1995 General Assembly repealed the pupil discipline code governing suspensions, expulsions, and exclusions from public schools and replaced it with a new code, I.C. 20-8.1-5.1. As noted in "Pupil Discipline Statute vs. Juvenile Justice Statute," Recent Decisions 1-12: 95, the new law has spawned a number of legal challenges and underscored marked differences of opinion among members of the Indiana Court of Appeals, where two important cases pit the authority of juvenile courts against the authority of a public school's governing body. The Indiana Supreme Court granted transfer on November 14, 1996, of In the Matter of H.L.K., 666 N.E.2d 80 (Ind. App. 1996), but has yet to issue an opinion which would, it is hoped, reconcile this case with In the Matter of P.J., 575 N.E.2d 22 (Ind. App. 1991).

Scope of Judicial Review: Procedural and Substantive Due Process

While the Supreme Court addresses the continuing controversy within the Court of Appeals, a more significant decision has been rendered involving the constitutionality of the legislature's attempt to limit judicial review of school-based expulsion decisions when it enacted I.C. 20-8.1-5.1-15, which reads as follows:

> Judicial review of a governing body's action under this chapter by the circuit or superior court of the county in which a student who is subject of the governing body's action resides is limited to the issue of whether the governing body acted without following the procedure required under this chapter.

During committee meetings when this provision was being discussed, the Indiana Department of Education warned legislators that attempts to limit judicial review to procedural adherence was not in accord with previous judicial determinations and may be unconstitutional under Article 1, §12 of Indiana's Constitution.[6] Nevertheless, the provision passed, was enacted, and has now been addressed judicially. In Board of School Trustees of the Muncie Comm. Schools v. Barnell, 678 N.E.2d 799 (Ind. App. 1997), the Court of Appeals reversed the trial court's determination that the student was denied due process by the school district when it expelled him for bringing a knife to school. The real issue in this case dealt with the scope of judicial review under I.C. 20-8.1-5.1-15. The school argued that the trial court was limited exclusively to reviewing the school's compliance with I.C. 20-8.1-5.1. The Court of Appeals disagreed, noting that a statute cannot "entirely prevent a court upon judicial review from determining whether a disciplinary action comports with the minimum requirements of due process. It was settled long ago that in Indiana there is a constitutional right to judicial review of an administrative decision." Id., at 802, citing Warren v. Indiana Telephone Co., 26 N.E.2d 399 (Ind. 1940), where the Indiana Supreme Court ruled that the legislature's attempts to prevent judicial review of an administrative body and to restrict the Supreme Court from exercising its right to review decisions by the appellate court unconstitutionally violated the right to judicial review. In addition, the court observed:

> Moreover, our Supreme Court has recognized that Article 1, section 12 of the Indiana Constitution mandates "that all discretionary acts of public officials, which directly and substantially affect the lives and property of the public, are subject to judicial review where the action of such officials is fraudulent, arbitrary or capricious, or otherwise illegal." State ex rel. Smitherman v. Davis, 151 N.E.2d 495, 498 (Ind. 1958).

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[6] "All courts shall be open; and every man, for injury done to him in person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay."

Id., at 803. "[B]ecause the legislature may not limit the scope of judicial review to certain questions, the legislature may not prevent a court from reviewing the constitutionality of the disciplinary decisions of a school board or school officials.... We therefore conclude that, notwithstanding I.C. 20-8.1-5.1-15, the reviewing court was not strictly limited to assessing the extent to which the Board's actions satisfied statutorily prescribed procedures." Id.

Oddly, the opinion in this case resurrected the H.L.K. and P.J. controversy. For this reason there are two opinions concurring with the majority opinion that the legislature cannot restrict a court's review of the constitutionality of an administrative agency's actions but taking exception to reopening the internal disputes revolving around H.L.K and P.J.

Exhaustion of Administrative Remedies;
Section 504 of the Rehabilitation Act of 1973

Brown v. MSD of Lawrence Township, 945 F.Supp. 1202 (S.D. Ind. 1996) involves an interesting interplay among various aspects of State student discipline procedures and federal disability laws. Brown was a fourth grade student in the fall of 1994. She has juvenile diabetes, which the school was aware of and for which it accommodated her. While on a field trip, her blood sugar tested a low level of 28 mg/dL. Her teacher instructed her to eat a piece of fruit, which she did. A later blood sugar reading showed that her level had risen to 66 mg/dL. While returning from the field trip, Brown began filing her fingernails with an instrument which also contained a small knife blade. When two students taunted her, she threatened them with the knife. Brown was suspended and eventually expelled. Brown raised the issue that her low blood sugar level resulted in her behavior. A statement from her physician stated, in part, that should Brown's blood sugar level go below 55 mg/dL, she may engage in some unusual behavior ranging from being lethargic to being belligerent or obtrusive. The school board upheld the expulsion, noting that Brown's blood sugar level was above the 55 mg/dL level at the time of the incident. However, the school board also found that due to Brown's diabetic condition, she was entitled to a hearing before a impartial hearing officer under 34 CFR §104.36 of Sec. 504 of the Rehabilitation Act of 1973. The student filed suit, alleging claims under IDEA and Sec. 504. The court granted the school's Motion for Summary Judgment based upon failure to exhaust administrative remedies, rejecting the student's claims that school-based expulsion processes satisfy the impartiality requirements of IDEA and Sec. 504.[7] The following are interesting findings by the court:

a. The court would not apply Indiana's 1995 pupil discipline statute because it took away rights of the student to seek judicial review. Because the act occurred prior to

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[7]This was an unusual argument because the student was also challenging the expulsion process as a denial of due process because the school's hearing examiner was an employee of the school.

enactment of I.C. 20-8.1-5.1, the court applied the substantive and procedural provisions of the former law. Id., at 1205-06.

b. IDEA due process requirements are distinct from school-based expulsion processes. A student has to exhaust the administrative remedies under 511 IAC 7-15-5 and 511 IAC 7-15-6 (Article 7) before initiating judicial review. Id., at 1206.

c. Where IDEA and Sec. 504 claims are raised, failure to exhaust IDEA administrative remedies precludes Sec. 504 claims. Id., at 1207.

d. "[T]he mere fact that the decision maker in a disciplinary hearing is also an administrative officer of the [school] does not in itself violate the dictates of due process," citing Winnick v. Manning, 460 F.2d 545, 548-49 (2nd Cir. 1972). Id., at 1209.[8]

Legal Settlement

The former pupil discipline law permitted schools to initiate exclusion proceedings where it believed a student did not have legal settlement within the school's boundaries. These exclusion proceedings required the school to identify the public school district where the student should attend and to advise the student of the right to appeal administratively to the Indiana State Board of Education. As noted above, the General Assembly repealed the pupil discipline law in 1995. The new law, I.C. 20-8.1-5.1-11, now permits schools to expel rather than exclude students for lack of legal settlement, does not require the school to identify the district where the student should attend, and does not require advising students of the right to appeal to the Indiana State Board of Education, although this appeal right still exists. I.C. 20-8.1-6.1-10(a)(1). An expulsion for legal settlement does not have the same ramifications as an expulsion for disciplinary reasons, but it is an expulsion. Some school districts have declined to expel students for this reason, choosing instead to initiate an original action before the Indiana State Board of Education for a determination of a student's "right to attend school in any school corporation." This is a permissible avenue under I.C. 20-8.1-6.1-10(a)(3)(C), as is an action to determine "legal settlement." See I.C. 20-8.1-6.1-10(a)(3)(A). The first case of this kind was In the Matter

[8]The federal court was applying the repealed pupil discipline law, which prohibited anyone involved in the charges against a student from serving as the hearing examiner. Current law at I.C. 20-8.1-5.1-13(a) repeats the former provisions but also allows a school employee to serve as hearing examiner so long as the employee "has not expelled the student during the current school year."

of K.B. and A.B., and the North Newton School Corporation, Cause No. 9611018 (SBOE 1997; Kevin C. McDowell, Hearing Examiner). The school corporation was aware of its right to initiate expulsion proceedings against the two elementary school students but indicated a preference for a less ominous (or ominous sounding) avenue through a direct action before the SBOE. The SBOE found the students did not have legal settlement in the school (or in Indiana).

There are advantages and disadvantages to proceeding this way. A disadvantage is that the SBOE is not restricted merely to reviewing the decision of the local school district to expel the students for lack of legal settlement. See, for example, "Guardianships for Educational Reasons," Recent Decisions 1-12: 95. An advantage is the avoidance of expulsion proceedings and the resulting stigma. An additional advantage is the SBOE's determination of lack of legal settlement may entitle the school to recoup tuition costs from the parents or guardians.

REINSTATEMENT OF TEACHER LICENSE FOLLOWING REVOCATION

In the Matter of J.J.E., Cause No. 9403253064 (IPSB 1996; Dr. Ena Shelley and Kevin C. McDowell, Administrative Law Judges) is the first reinstatement of a teacher's license following revocation (Attachment D). It was a difficult matter for Petitioner to demonstrate "fitness" to resume teaching based upon rehabilitation of her "character" and "reputation" during the intervening six years following her guilty plea to one count of possession of cocaine. However, J.J.E. was able to satisfy the seven criteria under 515 IAC 1-2-18(h) in demonstrating her fitness such that any further sanctions would be punitive and would defeat the remedial purpose of the IPSB's rules. See 515 IAC 1-2-18(j). The IPSB found J.J.E. in stark contrast to In the Matter of C.R.C. (see Recent Decisions 1-12:94). C.R.C. presented glowing testimonials as to his academic and personal qualifications, but all but one of his witnesses were unaware of his past legal difficulties (fraudulent transcript, forged teacher certificate, accepting a teaching position under false representation of licensure). J.J.E.'s witnesses were fully aware of her past legal difficulties. This is an important decision as it elaborates upon the IPSB's interpretation of "fitness" in assessing individuals and in applying the remedial aspects of its own rules.

TEACHER LICENSE SUSPENSION: MISCONDUCT IN OFFICE AND OUT-OF-STATE CONVICTIONS

In the Matter of B.A., Cause No. 951128085 (IPSB 1996; Dr. Lewis Ciminillo and Kevin C. McDowell, Administrative Law Judges) provides clarification regarding what constitutes "misconduct in office" such that the IPSB can revoke or suspend a license. The decision is also instructive because the "misconduct in office" occurred in a different State (Attachment E). B.A. taught for over twenty years in a Kentucky school district. While treasurer of the Teachers Credit Union, he engaged in various schemes to defraud insurance companies and the credit union by utilizing the accounts of fellow teachers without their knowledge or approval. B.A. pled guilty to one count of mail fraud and one count of bank fraud but applied for an Indiana

Teacher License before the court accepted his plea and sentenced him. Although Kentucky did not seek to revoke B.A.'s license, the Indiana State Superintendent of Public Instruction did initiate a complaint before the IPSB to revoke his Indiana licence.[9] One of the charges in the State Superintendent's complaint was that B.A. committed "misconduct in office." The IPSB acknowledged that "misconduct in office" is a vague standard with little judicial construction because it is typically included as a lesser included offense with more serious charges, such as immorality, incompentency, and willful neglect of duty (all of which have abundant statutory, administrative, and judicial treatments). The IPSB found that "misconduct in office" is more than mere negligence or carelessness, but requires an intentional, willful act. A conviction for fraud satisfies the requisite mental element for "misconduct in office." B.A. had his Indiana teacher license suspsended for one (1) year.

For other decisons related to B.A. issues, please see the following.

1. Satterfield v. Board of Education of the Grand Rapids Public Schools, 556 N.W.2d 888 (Mich. App. 1996), upholding the termination of the teacher's employment by the State Tenure Commission (STC) following his conviction for embezzling funds at his part-time job. Embezzlement is considered a crime of "moral turpitude" by the STC, raising a presumption Satterfield is unfit to teach. The court upheld his termination, finding there is a "rational nexus" between his act of embezzling and the performance of his duties as a teacher.

2. Barringer v. Caldwell County Bd. of Education, 473 S.E.2d 435 (N.C. App. 1996). A career teacher was dismissed from his position for "immorality" after pleading guilty to first degree trespass following an altercation at a pool hall where he brandished a loaded shotgun while carrying a pistol in his waistband. Barringer claimed that "immorality" is a vague standard and should not be applied. The court disagreed, finding that "immorality" within the context of dismissal of a teacher means such conduct that common judgment would indicate reflects poorly upon a teacher's fitness to teach. The court added that anyone of "ordinary intelligence" and utilizing "common understanding" would recognize that the teacher's pool hall activities—coupled with his verbal intent to cause harm—constitute "immorality," placing his teaching position in jeopardy. Id., at 440-41.

3. Toney v. Fairbanks North Star Borough Sch. Dist. Bd. of Education, 881 P.2d 1112 (Alaska 1994). The Alaska Supreme Court upheld the school district's termination of Toney for immorality once it learned that he had engaged in a sexual relationship with a 15-year-old student while a teacher in Idaho. Although not convicted of a crime, his failure to advise the Alaska school district of this occurrence constituted a material

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[9]As noted in Recent Decisions 1-12: 95, the State Superintendent has the authority to initiate revocation actions under I.C. 20-6.1-3-7(a), but the IPSB can assess a lesser penalty or no penalty following hearing on the matter.

misrepresentation. The Alaska Supreme Court held that there need not be a conviction nor need there be a separate showing of a nexus between the act or acts of moral turpitude and the teacher's fitness or capacity to perform his duties. Id., at 1114. The court rejected Toney's argument that it violated due process to terminate his employment for acts occurring prior to his accepting the Alaska position. The court also found that the Idaho conduct of Toney could never be too remote to support a teacher's dismissal. Id., at 1115.

November 6, 1997
Date

Kevin C. McDowell, General Counsel
Indiana Department of Education

TITLE 511 INDIANA STATE BOARD OF EDUCATION

LSA Document #96-287(F)

DIGEST

Adds 511 IAC 5-3 to establish appeal procedures and criteria for students who do not pass the graduation examination. Effective 30 days after filing with the secretary of state.

511 IAC 5-3

SECTION 1. 511 IAC 5-3 IS ADDED TO READ AS FOLLOWS:

Attachment
A
(3 pp.)

Rule 3. Graduation Examination

511 IAC 5-3-1 Definitions
Authority: IC 20-1-1-6; IC 20-10.1-16-10
Affected: IC 20-10.1-16-13

Sec. 1. (a) The definitions in this section apply throughout this rule.

(b) "Attendance rate" means the number of instructional days a student is present divided by the number of instructional days provided by the school during a specific period. Exceptions to compulsory attendance and excused absences shall be included as instructional days present for the purpose of this calculation.

(c) "Board" means the Indiana state board of education.

(d) "Educational proficiency standard" means the knowledge and skills that are:
(1) expected of a student for a particular subject area; and
(2) demonstrated by achieving a passing score on the graduation examination.

(e) "Graduation examination" means the test designated by the board under the ISTEP program which each student, beginning with the class of students who expect to graduate during the 1999-2000 school year, must pass to be eligible to graduate.

(f) "Principal" means a properly certified person who is assigned as the chief administrative officer of the school where the student attends.

(g) "Student" means any individual enrolled in a school accredited or approved by the board.

(h) "Subject area" means an academic course of study for which the department of education has developed educational proficiency statements and which the board has included in the graduation examination.

(i) "Teacher" means a properly certified, licensed person assigned to instruction of a student in a subject area. *(Indiana State Board of Education; 511 IAC 5-3-1; filed Aug 20, 1997, 3:20 p.m.: 21 IR 82)*

511 IAC 5-3-2 Completion of Core 40
Authority: IC 20-1-1-6; IC 20-10.1-16-10
Affected: IC 20-10.1-5.7-1; IC 20-10.1-16-13

Sec. 2. A student who does not receive a passing score on the graduation examination may be eligible to graduate if the principal of the school the student attends certifies that the student will within one (1) month of the student's scheduled graduation date complete all components of the Core 40 curriculum established under IC 20-10.1-5.7-1 with a grade of "C" or higher in all required and directed elective courses. *(Indiana State Board of Education; 511 IAC 5-3-2; filed Aug 20, 1997, 3:20 p.m.: 21 IR 82)*

511 IAC 5-3-3 Appeal of graduation examination results
Authority: IC 20-1-1-6; IC 20-10.1-16-10
Affected: IC 20-10.1-16-13

Sec. 3. A student who does not receive a passing score on the graduation examination may be eligible to graduate if all the of *[sic.]* following have occurred:
(1) The student must take the graduation examination in the subject area or subject areas in which the student did not achieve a passing score at least one (1) time every school year after the school year in which the student first takes the examination. The student may take the examination once every semester beginning with the school year after the school year in which the student first takes the examination.
(2) The student must complete remediation opportunities provided by the school.
(3) The student must maintain a minimum attendance rate of ninety-five percent (95%).
(4) The student must maintain a "C" average in the courses comprising the twenty-two (22) credits specifically required for graduation in 511 IAC 6-7-6.
(5) The student must obtain a written recommendation supporting a request for a waiver from a teacher of the student in the subject area or subject areas in which the student has not achieved a passing score. The principal must concur with the recommendation. The recommendation must be supported by written evidence that the student has attained the educational proficiency standard in the subject area or subject areas based upon:
(A) tests other than the graduation examination; or
(B) classroom work.
(6) The student must otherwise satisfy all state and local graduation requirements.

(b) For a student who receives special education services under 511 IAC 7:
(1) the student's teacher of record, as defined in 511 IAC 7-3-50, shall, in consultation with a teacher of the student in the subject area or subject areas in which the student has not achieved a passing score, make the recommendation required in subsection (a)(5); and
(2) the student's case conference committee shall:
(A) decide how frequently the student will take the graduation examination, within the limitations in subsection (a)(1); and
(B) determine if the student has met the criteria in subsection (a).

(c) Except as provided in subsection (b)(2)(A), no student shall be denied the opportunity to take the graduation examination once every semester beginning with the school year after the school year in which the student first takes the examination. *(Indiana State Board of Education; 511 IAC 5-3-3; filed Aug 20, 1997, 3:20 p.m.: 21 IR 82)*

LSA Document #96-287(F)
Notice of Intent Published: January 1, 1997; 20 IR 992
Proposed Rule Published: February 1, 1997; 20 IR 1215
Hearing Held: June 5, 1997
Approved by Attorney General: July 21, 1997
Approved by Governor: August 18, 1997
Filed with Secretary of State: August 20, 1997, 3:20 p.m.
Incorporated Documents Filed with Secretary of State: None

Indiana
State Board of Education

Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA STATE BOARD OF EDUCATION

In the Matter of:	)	
	)	
C.K., C.K. and K.K. and the Northwestern School Corporation of Howard County	)	**Cause No.: 9608011**

Legal Settlement Dispute Under
I.C. 20-8.1-6.1-1

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

This action was commenced upon the receipt on August 19, 1996, of a letter addressed to Mr. Jeffery Zaring, State Board Administrator, from the father of the three children involved, questioning the definition of "legal settlement" and requesting a hearing concerning the legal settlement of the children and the amount of cash tuition to be paid. On August 22, 1996, Dana L. Long was assigned as the hearing officer and requested that the parties submit dates on which they would be available for hearing. On August 28, 1996, the school corporation filed a Motion to Dismiss. This was not formally ruled upon and is therefor deemed denied. The hearing was subsequently scheduled for October 1, 1996 in the library conference room of Northwestern High School, Kokomo, Indiana. During the course of the hearing, the hearing officer discovered that the parents of the children are divorced and that the mother has custody of the children. The mother joined in this action which had been commenced by the father.

Present for the hearing were both the mother and father of the children, Dr. Patrick Mark, Superintendent of Northwestern School Corporation and Ryan Snoddy, Principal of Northwestern High School. The parents offered two exhibits, P-1, which was a narrative prepared by the father, and P-2, which was a copy of the legal settlement policy of Western School Corporation. The school corporation objected to Exhibit P-1 due to its characterization of certain actions of Northwestern. The hearing officer admitted the exhibit over the objection. The school corporation also objected to Exhibit P-2 due to relevancy. The objection was sustained. The school corporation offered seven exhibits. R-1 through R-7 which were admitted without objection:

Attachment
B
(5 pp.)

R-1 IC 20-8.1-6.1
R-2 Northwestern School Corporation Policy: Eligibility of Resident/Nonresident Students
R-3 Northwestern School Corporation Guidelines: Determination of Legal Settlement
R-4 Cash Tuition Transfer Application (blank)
R-5 Transfer Tuition Statement, 1996-1997
R-6 Letter from Petitioner to Jeffery Zaring requesting hearing
R-7 Cash Tuition Transfer Application for the Kurtz children

After review of the testimony and evidence,[1] the hearing officer makes the following findings of fact, conclusions of law and order:

Findings of Fact

1. The Petitioners are all under the age of 18. The only school corporation they have ever attended has been Northwestern School Corporation.

2. The family first moved into the Northwestern School Corporation district in 1983, residing at 1305 Green Acres Drive.

3. The family built a new home in 1987 at 11100 Parr Court, also within the Northwestern School Corporation district.

4. The parents are now divorced. The mother has custody of the children and they reside with her.

5. In 1993 the house on Parr Court was sold. The mother bought the house at 1305 Green Acres Drive and lived there with the children.

6. In 1996, the mother bought a lot at 710 South Hickory in the Spice Run subdivision with the intention of building a new home on the lot and moving into the new house in August. This lot is within the boundaries of the Northwestern School Corporation district.

7. The house on Green Acres Drive was sold in April, 1996, after the purchase of the lot on South Hickory.

8. The new house was to be completed in August, 1996. The rain in May caused construction delays, moving the projected completion date to the end of September, 1996.

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[1]On October 7, 1996, the hearing officer received a letter from Petitioners' father. Although this letter was also sent to the school corporation, the letter is not considered as either additional testimony or evidence and is not considered in this decision.

9. The mother was unable to locate temporary rental housing within the Northwestern School Corporation district while the house was completed and therefor rented an apartment in Venton Woods within the Western School Corporation district.

10. Upon registering the children for school, the father was advised that he would have to pay tuition since the children were not living within the boundaries of the school district at the start of school. The house was 75% completed at this time.

11. The parents were required to submit a cash transfer application for the three children, which was approved by the principal and the superintendent.

12. Northwestern School Corporation did count all three Petitioners for the "average daily membership," or "ADM" of the school corporation.

13. Tuition was paid in the amount of $800.00 through September 26, 1996. An additional $160.02 tuition was paid through October 4, 1996. The amount of the cash tuition was determined pursuant to the Transfer Tuition Statement (Exhibit R-5). No objections were made to these calculations or the actual amount of tuition charged.

14. The mother and the children will move into the new home on October 5, 1996.

15. Northwestern School Corporation policy provides, in part, that the Board will educate, tuition free, only those students who have legal settlement in the Corporation. The policy further provides that students whose parents do not have legal settlement within the corporation but who present evidence that they will move into the corporation within a short period of time may enroll in the schools as tuition students for the time not in residence.

Conclusions of Law

1. Pursuant to Ind. Code § 20-8.1-6.1-10, the State Board of Education has jurisdiction over this matter.

2. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such. Any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

3. Petitioners reside with their mother. Petitioners are under the age of 18. Petitioners are supported and cared for by their mother. I.C. 20-8.1-6.1-1(a).

4. The 710 South Hickory address is the permanent and principal habitation of Petitioners and their mother, and is Petitioners' legal settlement. I.C. 20-8.1-6.1-1(b).

5. Petitioners did not establish legal settlement within the Western School Corporation district during the period of August-October 4, 1996.

Discussion

"Legal settlement" is generally synonymous with "residence," "resides," or other comparable language, and means a permanent and principal habitation which a person uses for a home for a fixed or indefinite period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose. The term is not synonymous with "legal domicile." I.C. 20-8.1-6.1-1(b). This doesn't mean that "legal domicile" and "legal settlement" cannot ever serve to define each other.

"Establishing a new residence or domicile terminates the former domicile. A change of domicile requires an actual moving with an intent to go to a given place and remain there." State Election Bd. v. Bayh, 521 N.E.2d 1313, 1317 (Ind. 1988). "A person who leaves his place of residence temporarily, but with the intention of returning, has not lost his original residence." Yonkey v. State, 27 Ind. 236 (Ind. 1866), Bayh, id., at 1317. "Intent and conduct must converge to establish a new domicile." Bayh, id., at 1318. "Physical presence in a place is only one circumstance in determining a domicile." Id. "Residency requires a definite intention and 'evidence of acts undertaken in furtherance of the requisite intent, which makes the intent manifest and believable.' In re Evrard (1975), 263 Ind. 435, 440, 333 N.E.2d 765, 767." Id. "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning . . . as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant . . . for all purposes of enjoying civil and political privileges, and of being subject to civil duties." Culbertson v. Board of Commissioners of Floyd County (1876), 52 Ind. 361, 368-69.

Petitioners have always attended the Northwestern School Corporation. There is no dispute herein that Petitioners' mother never intended to leave the boundaries of the Northwestern School Corporation and never intended to reside within the boundaries of Western School Corporation except for a temporary period of time. Petitioners' mother owned her home and bought a new lot on which to build a new residence. When school started, the new residence was not completed and Petitioners and their mother were forced to obtain temporary shelter elsewhere. The specific facts of this case, together with the intent and conduct of Petitioners' mother, lead to the conclusion that Petitioners' mother left the residence on Green Acres Drive to establish a new residence on South Hickory. There was never an intention to establish residency in Venton Woods, consequently legal settlement was not established in the Western School Corporation district.

Equity considerations are also important in this matter. While ownership of real estate and the payment of taxes does not in itself confer the right to attend school within that district, Petitioners' mother has, at all times relevant herein, owned land and her residence, which is subject to real property tax, within the school district. The school corporation has received the benefit of that property tax and has, properly, counted the children for ADM purposes, receiving

the state support for the three Petitioners. The school corporation has suffered no loss nor incurred additional expense. Petitioners were faced with the dilemma of the expense of paying tuition, or disrupting their education by temporarily transferring from Northwestern to Western, and then back to Northwestern again. While not specifically addressing the fact situation involved here, the legal settlement statute expresses an intent to avoid such disruptions by expressly permitting students who move during a school year to finish the semester, and possibly the school year, within the original school corporation. Petitioners should not be penalized because the need for temporary shelter outside the school district boundaries came during the first six or seven weeks of the school year rather than in the middle or end of the semester.

Order

Petitioners, having legal settlement within the Northwestern School Corporation district, are entitled to attend the Northwestern schools without the payment of tuition. Any tuition previously paid by Petitioners' parents shall be refunded by the Northwestern School Corporation.

Dated: October 18, 1996

/s/ Dana L. Long
Dana L. Long, Hearing Officer for the Indiana State Board of Education

INDIANA STATE BOARD OF EDUCATION ACTION

On December 5, 1996, the Indiana State Board of Education heard oral argument. After discussion, the Indiana State Board of Education adopted the decision of the Administrative Law Judge by a vote of 10-1.

APPEAL PROCEDURE

Any party aggrieved by the decision of the Indiana State Board of Education can seek judicial review from a civil court with jurisdiction within thirty (30) calendar days from receipt of this decision.

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

INDIANA STATE BOARD OF EDUCATION

Cause No. 9512026

M.S.D. of Southwest Allen County, Petitioner and Counter-Respondent	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
Allen County, Respondent and Counter-Petitioner	)	
Transfer Tuition Dispute under I.C. 20-8.1-6.1-10 (Amount of Transfer Tuition Owed)	)	

Procedural History

On December 18, 1995, the M.S.D. of Southwest Allen County (hereafter, "the School") filed its petition with the Indiana State Board of Education, requesting a determination of the amount of transfer tuition owed for eight students placed in a group home within the school's boundaries. The eight students have varying degrees of disabilities, but all received educational services from the school from August 18, 1993, through June 3, 1994. The school alleges that all eight students lived within Allen County and requests reimbursement from Allen County of $101,448.72, a penalty of twenty-five (25) percent for alleged bad faith, and attorney fees.

A hearing examiner was appointed on December 28, 1995. By Notice of Appointment and Preliminary Order of the same date, the hearing examiner advised the parties that because the 1993-1994 school year is involved, the transfer tuition law in effect prior to July 1, 1995, will be applied.

On January 31, 1996, Allen County (hereafter, "the County") filed an answer to the school's petition, generally denying any responsibility for transfer tuition of the eight students. The county also stated in its response that the school allegedly failed to provide the county with

Attachment
C
(14 pp.)

documentation from "the State Department of Public Welfare supporting its position that the students for whom it seeks transfer tuition were placed pursuant to the transfer tuition statutes.[1]

The county also filed a counterclaim against the school, alleging that the school received transfer tuition from the county for the 1990-1991, 1991-1992, and 1992-1993 school years for which the school was not entitled. The amount of reimbursement requested was $147,172.17, plus interest and attorney fees.

On February 19, 1996, the school replied to the county's counterclaim, generally denying any responsibility to repay any amount to the county.

The hearing examiner, by order of February 22, 1996, set a hearing date for March 29, 1996. The county on March 18, 1996, moved for a continuance. This was granted the same date. On April 16, 1996, the hearing was rescheduled for May 22, 1996. The school moved for a continuance on May 16, 1996. A continuance was granted on May 17, 1996. The hearing was rescheduled for July 30, 1996, by order dated June 27, 1996.

The parties requested the submission of stipulated facts in lieu of a hearing. On July 30, 1996, the parties did file a joint Stipulation to Facts. The hearing examiner established a briefing schedule. Both parties timely field briefs in support of their positions based upon the aforementioned stipulated facts.

Upon consideration of the foregoing, the following Findings of Fact and Conclusions of Law are determined.

Findings of Fact

1. Anthony Wayne Services (hereafter, the "group home") operates two group homes in Allen County for the developmentally disabled. The group home is located within the boundaries of the school.

2. The group home is a state-licensed, not-for-profit organization. Family Social Services Administration (FSSA) and its agencies contract with the group home for placements of individuals with developmental disabilities.

3. The following eight students received educational services from the school for the entire 1993-1994 school year. The amount of transfer tuition calculated is not in question, only the responsibility to pay same.[2]

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[1]The county referred to I.C. 20-8.1-6.5-5. However, this provision applies to desegregation transfers. The school has not alleged any right to payment under this law.

[2]There is a ninth student, J.R., who is referenced in the documents submitted by both parties. However, no claim has been presented for J.R. As a consequence, this student is not included herein.

Student	Date of Placement	Medicaid Approval Date	Transfer Tuition
S.B.	3/1/90	3/16/90	$ 7,734.52
J.B.	6/6/91	6/20/91	$ 7,734.52
D.C.	6/6/91	6/21/91	$ 7,734.52
R.C.	1/22/90	1/26/90	$17,627.66
K.H.	6/10/91	6/4/91	$17,627.66
M.M.	6/10/91	6/4/91	$17,627.66
J.S.	2/5/90	5/1/92	$17,627.66
B.J.W.	12/18/89	2/2/90	$ 7,734.52

4. The total amount of the transfer tuition requested by the school of the county for the 1993-1994 school year is $101,448.72.

5. At all times relevant, each student was under eighteen (18) years of age or over that age but not emancipated, and each student's parent or guardian resided in a school district other than the Petitioner school, but resided within Respondent Allen County.

6. The Allen County Division of Family and Children at all times relevant maintained active case files on and was involved in the placement of D.C. and B.J.W. at the group home but did not maintain active case files, provide services to, or place the other six students at the group home.[3]

7. The counter-Petitioner Allen County requests reimbursement of $147,172.17 for transfer

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[3]Finding of Fact 6 is derived from the parties "Stipulation to Facts," ¶s 9, 10 and 11. Although each county maintains a Division of Family and Children (DFC), these have a unique status in that they are created locally, I.C. 12-19-1-1, with the power to sue or be sued, I.C. 12-19-1-12, and yet are not fully autonomous county entities. See. I.C. 12-19-1-10. This quasi-State agency status under the overall umbrella of FSSA through the State Division of Family and Children is no small source of confusion for anyone attempting to understand the organizational structure created by the General Assembly in 1992, which resulted in FSSA. See, for example, J.A.W. v. State, 650 N.E.2d 1142 (Ind. App., 1995) and In re E.I., 653 N.E.2d 503 (Ind. App. 1995). However, the State Board of Education has already addressed FSSA in terms of transfer tuition responsibility, as discussed *infra.*

tuition paid to the counter-Respondent school for three separate school years.[4] The school does not contest the calculated amount, but does contest its responsibility to reimburse these funds to the county, with interest.

8. On August 11, 1994, the school sent a letter to the County Auditor requesting payment of the transfer tuition for the eight students. Correspondence between the school and county continued through June 1995, with the county contesting initially the increase in transfer tuition and then contesting its financial responsibility.

9. During the 1993-1994 school year, I.C. 20-8.1-6.1-1 (legal settlement), read in relevant part as follows:

> Sec. 1 (a) The legal settlement of a student shall be governed by the following provisions:
>
> (1) If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside.
>
> (2) Where the student's mother and father, in a situation otherwise covered in subdivision (1), are divorced or separated, the legal settlement of the student is the school corporation whose attendance area contains the residence of the parent with whom the student is living, in the following situations:
>
> > (A) Where no court order has been made establishing the custody of the student.
> >
> > (B) Where both parents have agreed on the parent or person with whom the student will live.
> >
> > (C) Where the parent granted custody of the student has abandoned the student. In the event a dispute between the parents of the student, or between the parents and any students over eighteen (18) years of age, the legal settlement of the student shall be determined as otherwise provided in this section.

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[4]The county indicated the three school years are 1991-1992, 1992-1993, and 1993-1994. However, the county made no payments in 1993-1994, this being the underlying dispute in the Petition. The school acknowledges that the correct school years are 1990-1991, 1991-1992, and 1992-1993.

(3) Where the legal settlement of a student, in a situation to which subdivision (1) otherwise applies, cannot reasonably be determined, and the student is being supported by, cared for by, and living with some other person, the legal settlement of the student shall be in the attendance area of that person's residence, except where the parents of the student are able to support the student but have placed him in the home of another person, or permitted the student to live with another person, primarily for the purpose of attending school in the attendance area where the other person resides. The school may, if the facts are in dispute, condition acceptance of the student's legal settlement on the appointment of that person as legal guardian or custodian of the student, and the date of legal settlement will be fixed to coincide with the commencement of the proceedings for the appointment of the guardian or custodian. However, if a student does not reside with the student's parents because the student's parents are unable to support the child (and the child is not residing with a person other than a parent primarily for the purpose of attending a particular school), the student's legal settlement is where the student resides, and the establishment of a legal guardianship may not be required by the school. In addition, a legal guardianship or custodianship established solely for the purpose of attending school in a particular school corporation does not affect the determination of the legal settlement of the student under this chapter.

(4) Where a student, to which subdivision (1) would otherwise apply, is married and living with a spouse, the legal settlement of that student is in the attendance area of the school corporation where the student and the student's spouse reside.

(5) Where the student's parents:

(A) are living outside the United States due to educational pursuits or a job assignment;

(B) maintain no permanent home in any school corporation in the United States; and

(C) have placed the student in the home of another person;

the legal settlement of the student is in the attendance area where the other person resides.

(6) Where the student is emancipated, the legal settlement is the attendance area of the school corporation of the student's residence.

. . .

(b) The words "residence", "resides", or other comparable language when used in this chapter with respect to legal settlement, transfers, and the payment of tuition, means a permanent and principal habitation which a person uses for a home for a fixed or indefinite period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose. These terms are not synonymous with legal domicile. Where a court order grants a person custody of a student, the residence of the student is where the person resides.

. . .

(d) A student is emancipated when the student:

(1) furnishes the student's support from the student's own resources;

(2) is not dependent in any material way on the student's parents for support;

(3) files or is required by applicable law to file a separate tax return; and

(4) maintains a residence separate from that of the student's parents.

(e) For purposes of calculating the amount of state distribution of money to any school corporation the following apply;

(1) A student is a resident of a school corporation if the student's legal settlement is in its attendance area.

(2) If the student's transfer tuition is paid by an Indiana county, the student is a resident of the school corporation whose local public schools the student is attending.

10. During the 1993-1994 school year, I.C. 20-8.1-6.1-5 (School Attendance By Child in

Institutional Care; Payment of Transfer Tuition) read as follows:

Sec. 5. (a) a student who is placed in a state licensed private or public health care facility, child care facility, or foster home:

(1) by or with the consent of the division of family and children;

(2) by a court order; or

(3) by a child-placing agency licensed by the division of family and children;

may attend school in the school corporation in which the home or facility is located. If the school corporation in which the home or facility is located is not the school corporation in which the student has legal settlement, the county of the student's legal settlement shall pay the transfer tuition of the student.

(b) A student who is placed in a state licenced private or public health care or child care facility by a parent or guardian may attend school in the school corporation in which the facility is located if:

(1) The placement is necessary for the student's physical or emotional health and well-being; and

(2) the placement is for no less than four (4) weeks.

The school corporation in which the student has legal settlement shall pay the transfer tuition of the student. The parent or guardian of the student shall notify the school corporation in which the facility is located and the school corporation of the student's legal settlement, if identifiable, of the placement. No later than thirty (30) days after this notice, the school corporation of legal settlement shall either pay the transfer tuition of the transferred student or appeal the payment by notice to the department of education. The acceptance or notice of appeal by the school corporation shall be given by certified mail to the parent or guardian of the student and any affected school corporation. In the case of a student who is not identified as handicapped under I.C. 20-1-6, the Indiana state board of education shall make a determination on transfer tuition in accordance with the procedures set out in section 10 of this chapter. In the case of a student who has been identified as handicapped under I.C. 20-1-6, the determination on transfer tuition shall be made in accordance with

this subsection and the procedures adopted by the Indiana state board of education under I.C. 20-1-6-2.1(a)(5).

(c) A student who is placed in an institution operated by the division of aging and rehabilitative services or the division of mental health may attend school in the school corporation in which the institution is located. The state shall pay the transfer tuition of the student.

(d) Where transfer tuition is paid under this chapter by the county, the transfer tuition shall be paid by the county commissioners, or their successors in office, from the county general fund without appropriation. If the county fails to pay the transfer tuition as required under this section, the auditor of state may withhold money from the county under section 11 of this chapter for payment of the transfer tuition owed.

11. During the 1993-1994 school year, I.C. 20-8.1-6.1-11(c) read as follows[5]:

(c) Whenever a school corporation or special education cooperative prevails at the final adjudication of an administrative proceeding under this chapter, or a lawsuit against a county or another school corporation to compel payment of transfer tuition owed by that county or school corporation under this chapter, the administrative body or the court shall award to the prevailing party the transfer tuition owed, if any, plus reasonable attorney's fees and a penalty not to exceed twenty-five percent (25%) of the amount of transfer tuition owed.

Conclusions of Law

Because of the number of legal issues raised by bother parties in both the initial claim and the counterclaim, it is necessary to address each issue separately.

1. *Conclusion of Law: Legal Settlement*

The parties stipulated that all eight students placed at the group home are under the age of eighteen (18) or over that age but not emancipated. The parents or guardians of the eight students reside in Allen County but do not reside within the boundaries of the Petitioner

[5]I.C. 20-8.1-6.1-1, I.C. 20-8.1-6.1-5, and I.C. 20-8.1-6.1-11 have been amended since the 1993-1994 school year. However, the parties acknowledge that the statutes then in force apply to this dispute.

school corporation. Although the school asserts in its brief that legal settlement has not been raised as an issue, the hearing examiner finds that the issue has been raised. In the Petition for Determination of Transfer Tuition Due at ¶6, the school stated the parents or legal guardians maintained permanent or principle residences in the county. The county's Answer at ¶6 stated it was without knowledge in this respect and, as a consequence, reserved the right to deny this. Later, the county stipulated that the parents or guardians do reside in Allen County but not within the boundaries of the Petitioner school corporation (Stipulation To Facts, ¶5). In the county's subsequent brief, the county argued that the eight students had established legal settlement at the group home within the petitioner school corporation and, hence, the county was not obligated to pay the transfer tuition. The county's argument is based upon the following language from I.C. 20-8.1-1-1(a)(3) as in effect in 1994 (see Finding of Fact No. 9):

> However, if a student does not reside with the student's parents because the student's parents are unable to support the child (and the child is not residing with a person other than the parent primarily for the purpose of attending a particular school), the student's legal settlement is where the student resides, and the establishment of a legal guardianship may not be required by the school.

The county's reliance upon this language is misguided. This language refers to the establishment of guardianship by virtue of circumstances without recourse to legal documents. This is more commonly known as *in loco parentis*. " An individual is said to stand *in loco parentis* when he assumes the *legal* obligations of parenthood without going through the legal formalities of adoption... For all intents and purposes, the legal guardian becomes the child's parent." Sturrup v. Mahan, 305 N.E.2d 877, 882 (Ind. 1974) (emphasis original). The relationship between the group home and these students is contractual. There is no evidence or documentation which would indicate a parental relationship. The facts as presented in this case indicate that the students' parents have no intention to terminate their parental relationship with their children, and that their homes are still the "residence" of these students when not placed at the group home. The facts presented in this case support a conclusion that the "home" for each of these students is still where their parents reside. I.C. 20-8.1-1-1(b). There is no court order establishing alternative custodial relationships.

The plain language of I.C. 20-8.1-1-1(a)(1)applies to this case:

> If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside.

To adopt the county's reasoning would be to interfere with the parental relationship of

every student placed at any school operated by the state or which contracts with the state or any governmental entity. Parents do not lose their rights merely because they require or request assistance from others in caring for the special health and welfare needs of their children.

Conclusion: The eight students at the group home have legal settlement within Allen County but do not have legal settlement within the Petitioner school corporation, which provided them educational services during the 1993-1994 school year.

2. *Conclusion of Law : Nature of Placement*

The parties acknowledge that under the law in effect during the 1993-1994 school year, if any one of these students was placed at the group home:

(1) by or with the consent of the division of family and children;
(2) by a court order; or
(3) by a child-placing agency licensed by the division of family and children;

then the county of legal settlement is responsible for the payment of transfer tuition to the Petitioner school corporation (see Finding of Fact No. 10).

The hearing examiner will not dwell long on the county's argument that it is not responsible because it could not give "consent" to the placements in the group home. As stated in Note No. 3 to this decision, the relationship of county DFC's to FSSA is controlled by statute, which provides the clearest understanding of the organizational structure of FSSA. FSSA is a so-called "super agency" created by the General Assembly in 1992 through P.L. 2-1992. Under this aegis are, among others, the Division of Disability, Aging, and Rehabilitative Services (DARS), I.C. 12-9-1, the Division of Mental Health, I.C. 12-21-1, and the Division of Family and Children (DFC), I.C. 12-13-1. The State DFC has broad authority in directing the operations of county DFCs through rules. I.C. 12-19-1-10. These Divisions and their bureaus are subject to FSSA administration. I.C. 12-8-4. FSSA's broad authority for administrative oversight is described in some detail in In re E.I., 653 N.E.2d 503, 509-10 (Ind. App. 1995). The county does not deny that these placements were effected by some entity or entities within FSSA. It is not unclear, as the county suggests, how the students came to be placed at the group home. The attachments to the Stipulation To Facts submitted jointly by the parties on July 30, 1996, indicate that each affected student was placed "by or with the consent of the division of family and children." There is no requirement that the county DFC "consent" in some fashion. In addition, there is no requirement that any other entity of FSSA be "licensed" by DFC to place children in a group home where there is statutory authority to do so. A "license" is, simply, a privilege granted by some competent authority to engage in some activity not otherwise permitted by law. New Horizon Maternity Home and the Alexandria Community School Corp., Cause No. 9005028 (SBOE 1990), relying upon I.C. 4-21.5-1-8, Stone v. Fritts, 82 N.E. 792, 794

(Ind. 1907), Grossman v. City of Indianapolis, 88 N.E. 945, 947 (Ind. 1909), and Shuman v. City of Fort Wayne, 26 N.E. 560, 561-62 (Ind. 1891). The county does not argue that any of these students were placed in contravention of law.

The Petitioner school corporation also noted in its brief that the Indiana State Board of Education addressed a similar issue in Southwest Allen County Schools and Delaware County, Cause No. 9305008 (SBOE 1993), where the assistance and consent of FSSA satisfied the requirements of I.C. 20-8.1-6.1-5(a) since DFC is administratively operated by FSSA.[6]

Conclusion: The students in question were placed in the group home "by or with the consent of the division of family and children." The reference to "division of family and children" refers to the State DFC. Consent from the county DFC is neither required nor controlling. Allen County is responsible for the payment of transfer tuition to the MSD of Southwest Allen County in the amount of $101,448.72.

3. *Conclusion of Law: Penalty for Vexatious Refusal to Pay; Interest*

The school has requested under I.C. 20-8.1-6.1-11(c) that the county be assessed "a penalty not to exceed twenty-five percent (25%) of the amount of transfer tuition owed." See Finding of Fact No. 11. The school's request is predicated upon what it describes as the county's "vexatious refusal to pay its statutory obligation." (Petition for Determination of Transfer Tuition Due, p.5). It also characterizes the alleged vexatious behavior as a "bad faith refusal to pay." The school did not request interest on the amount owed. This is essentially the same language employed by the school in Southwest Allen County Schools and Delaware County, *supra*. The State Board of Education cautioned the school in this regard, citing to Stath v. Williams, 367 N.E.2d 1120, 1124 (Ind. App. 1977), which defined "bad faith" as more than simple bad judgment or negligence. "Bad faith" requires "dishonest purpose or moral obliquity... [I]t contemplates a state of mind affirmatively operating with furtive design or ill will." Id. However, Indiana does recognize a lesser standard of "procedural bad faith," which involves, among other flagrant activities, "the omission or misstatement of relevant facts" or writing and submitting briefs "written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Watson v.

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[6]The County also argues that I.C. 20-1-6-18.1 applies, which would require the school corporations of legal settlement to pay the transfer tuition. This appears to be an argument in the alternative. However, this statute is inapplicable. It would only apply where the student's school corporation of legal settlement transferred the student. There are no allegations or evidence that this occurred with any of these students.

Thibodeau, 559 N.E.2d 1205, 1211 (Ind. App. 1990).

In this case, Petitioner did not request interest directly, although there is a vague prayer for "equitable relief" or "other relief appropriate in the premises." Petitioner's Reply and Affirmative Defenses to Counterclaim, p. 4. The vagueness is insufficient to put the county on notice regarding possible interest payments. The statute then in effect did not include interest as possible relief. Accordingly, interest will not be assessed.

The hearing examiner finds that there is no "bad faith" on the part of the county. The hearing examiner also finds that there is no "procedural bad faith" on the part of the county. However, the assessment of the penalty is not premised upon a finding of "bad faith" in any form. The hearing examiner finds that the county's refusal to pay the transfer tuition was not "bad faith" but was unreasonable given the arguments presented. A penalty will be assessed, but only to the extent necessary to place the school in the position it would have been but for the unreasonable refusal of Allen County to pay the transfer tuition demanded.

Conclusion: Allen county shall pay, as a penalty under I.C. 20-8.1-6.1-11(c), to MSD of Southwest Allen County eight (8) percent of the amount of transfer tuition owed, said amount to be in addition to the transfer tuition owed without compounding.

4. *Conclusion of Law: Attorney Fees*

The school is the prevailing party. I.C. 20-8.1-6.1-11(c) permits the State Board of Education to award reasonable attorney fees to a school corporation which prevails in a transfer tuition hearing such as this. See Finding of Fact No. 11. "Reasonable attorney fees" in this situation means the usual and customary fee in the Allen County area for same or similar administrative litigation. Times and charges are to be calculated from August 11, 1994, the date upon which the authorized county representative was placed on notice of the amount of transfer tuition owed and the basis for such a claim.

Conclusion: The MSD of Southwest Allen County is entitled to reasonable attorney fees from August 11, 1994. A proposed statement is to be provided the hearing examiner within thirty (30) calendar days following action by the State Board of Education regarding this recommended decision. A copy of the statement shall be provided to counsel for the Respondent county who shall have thirty (30) calendar days from receipt of the billing statement to provide any written statements regarding same. Should the parties resolve this issue at any time prior to the issuance of a recommended order in this regard, please advise the hearing examiner.

5. *Conclusion of Law: Jurisdiction*

The Respondent county, in its Answer, Affirmative Defenses and Counterclaim, p. 3, raises as an affirmative defense a "lack of jurisdiction over the subject matter." The

county did not elaborate further. At all times relevant herein, the State Board of Education had jurisdiction under I.C. 20-8.1-6.1-10(a)(3).

Conclusion: The State Board of Education has jurisdiction in this matter to resolve the issues raised by both parties.

6. *Conclusion of Law Counterclaim*

The Respondent County's counterclaim for reimbursement of past transfer tuition payments must be denied. The counterclaim is based upon the same legal theories as its refusal to pay the underlying claim for the 1993-1994 school year. As noted above, these arguments are unpersuasive and are unreasonable. In order to succeed in this matter on its counterclaim, the county would have had to prove it was not responsible for the 1993-1994 transfer tuition. This it did not do. There is no need to address further any of the affirmative defenses raised by the school.

Conclusion: There is no legal basis for granting the relief requested by the Allen County in its counterclaim.

Orders

1. Allen County shall pay to the MSD of Southwest Allen County the sum of $101,448.72, which represents the amount of transfer tuition owed for the 1993-1994 school year.

2. Allen County shall pay to the MSD of Southwest Allen County a penalty determined to be eight (8) percent of the amount of transfer tuition owed for the 1993-1994 school year.

3. The MSD of Southwest Allen County is entitled to reasonable attorney fees, calculated from August 11, 1994. The amount of fees will be determined by the hearing examiner below as a supplemental proceeding, subject to review and final determination by the State Board of Education.

4. The counterclaim of Allen County is denied.

Date: November 27, 1996

/s/Kevin C. McDowell
Kevin C. McDowell, Hearing Examiner
Indiana Department of Education
Room 229, State House
Indianapolis, IN 46204-2798
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ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its meeting of February 6, 1997, and following oral argumetn, adopted the decison of the Hearing Examiner by a unanimous vote with one abstention.

Appeal Right

Any party aggrieved by the decision of the Indiana State Board of Education has thirty (30) calendar days from receipt of this decision to seek judicial review from a civil court with jurisdiction, as provided by I.C. 20-8.1-6.1-10(e).

Indiana Professional Standards Board

"Setting standards for the preparation and licensing of educators"

251 East Ohio Street, Suite 201 - Indianapolis, IN 46204-2133
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BEFORE THE INDIANA
PROFESSIONAL STANDARDS BOARD

Cause No. 9403253064

In the Matter of J. J. E.	)	Before Dr. Ena Shelley and
	)	Kevin C. McDowell,
	)	Administrative Law Judges
Petition for Reinstatement of Teaching	)	
License Under 515 IAC 1-2-18(e)	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Petitioner pled guilty on September 6, 1991, to one count of possession of cocaine, a Class D felony, following an incident in September 1990 which is described more particularly in the Findings of Fact. On February 14, 1992, the State Superintendent of Public Instruction initiated a license revocation action under I.C. 20-6.1-3-7. Petitioner voluntarily surrendered her license in April 1992 On April 20, 1994, Petitioner sought reinstatement of her license. Pursuant to 515 IAC 1-2-18(e),(f), and (h), Administrative Law Judges were appointed, the record was reviewed, and a fitness hearing was conducted.

Petitioner was represented by counsel. The Division of Teacher Licensing was also represented by counsel. Numerous continuances were requested and granted in this matter for a variety of reasons, including substitution of new counsel for the Division of Teacher Licensing and substitution for one of the original Administrative Law Judges. An evidentiary hearing was conducted April 22, 1996, in the Central Offices of the Indiana Department of Education. Petitioner appeared with counsel, as did the Division of Teacher Certification. The Administrative Law Judges, pursuant to I.C. 4-21.5-3-26(f), took official notice of the record of the previous revocation/license surrender action. Also, pursuant to I.C. 4-21.5-3-26(b), witnesses, under oath or affirmation, provided testimony regarding the fitness and character of Petitioner. Petitioner testified on her own behalf. The Administrative Law Judges had opportunity to observe Petitioner throughout, and considered her demeanor and credibility in assessing her fitness to teach under 515 IAC 1-2-18(h) and the criteria established under In the Matter of C.R.C., Cause No. 940419067 (IPSB 1994). From a review of the record, the documents submitted, and the testimony provided, the following Findings of Fact and Conclusions of Law are determined.

Findings of Fact

1. Petitioner is 43 years old. While teaching in the Indianapolis Public Schools, she became personally involved with a person who was dealing in drugs, including cocaine. Although Petitioner has never used drugs, she was aware of this activity. Petitioner was in his car when he attempted to transact a deal with an undercover police agent. She was arrested. Although originally charged with eight counts, she eventually pled guilty to a single count of possession of cocaine, a Class D. felony. She received a suspended 180 day sentence and was placed on probation for one year. This plea agreement was reached on September 6, 1991. She submitted to random urinalyses, all of which were negative, and successfully completed the terms of her probation.

2. In April 1992, Petitioner voluntarily surrendered her teaching license (License No. 430128).

3. Petitioner voluntarily sought counseling. The counselor testified that 80 percent of referrals are court-initiated. Only 20 percent of her case load is voluntary. It was the counselor's professional opinion based upon assessments and other data that Petitioner has no chemical dependency or is at risk of such dependency.

4. Petitioner's former principal, now retired, related that Petitioner was an exceptional teacher who was well liked and who cared about her students. She received superior teaching evaluations. He described Petitioner as dependable, reliable and trustworthy, and would be willing to employ Petitioner notwithstanding the Class D felony conviction. Petitioner also assumed other responsibilities at her school, including coaching sports and sponsoring the cheerleaders. He acknowledged that hiring a person with a conviction of this sort is a risk, but he believes that Petitioner would be a positive influence on her students, rather than a negative one, and that her experiences would make her a forceful example to students.

5. Two physicians provided testimony (one in person, one by written statement) testifying to the character of Petitioner. Petitioner has been the care giver for the child of the physicians. The physicians' testimony (which supported the counselor's and principal's assessments of her character as trustworthy, reliable and dependable) was based on knowledge of Petitioner's past legal difficulties, thus meeting the C.R.C. standard for consideration (see discussion below). The physicians did have reservations initially, but decided to give Petitioner an opportunity. Petitioner has exceeded their admittedly high expectations, often providing assistance and accommodations of schedules not usually expected of a care giver. The physicians testified as to her integrity and honesty, and provided examples of the trust they have placed in Petitioner.

6. Petitioner's father testified as to Petitioner's love of teaching and her eventual work with students with disabilities. Petitioner has also been an attendant at the nursery school at her church. Church members are aware of her past legal difficulties, yet she was hired for this position. The pastor is reported to be proud of Petitioner's efforts in the nursery school.

7. Petitioner testified as to her professional development as a teacher, including obtaining teaching endorsements in special education. She choreographed dance routines for school musicals, and coached cross country, volleyball and tennis, as well as sponsored the cheerleaders. Petitioner described the disappointment in her of her students following her arrest. Petitioner believes she let the students down. She would like the opportunity to redeem herself and be someone her child can be proud of. She is grateful to the people who have given her a second chance. Petitioner does not assert that she is entitled to reinstatement. She acknowledges the risk involved should the IPSB reinstate her license, but she is also seeking forgiveness. She comes from a family of teachers, and she wants to resume teaching. She also wishes to atone for the shock, disappointment and sadness she caused her students and fellow teachers and administrators.

Conclusions of Law

1. 515 IAC 1-2-18(h) contains seven distinct considerations for determining fitness. This rule reads as follows:

> (h) An individual who petitions the professional standards board for reinstatement of a revoked or surrendered license and an individual required to participate in a fitness hearing under subsection (g) before receiving an initial license shall have the burden of proving fitness to hold a license. In making a determination of fitness, the professional standards board shall consider the following factors:
>
> (1) The likelihood the conduct or offense adversely affected, or would affect, students or fellow teachers, and the degree of adversity anticipated.
>
> (2) The proximity or remoteness in time of the conduct or offense.
>
> (3) The type of teaching credential held or sought by the individual.
>
> (4) Extenuating or aggravating circumstances surrounding the conduct or offense.
>
> (5) The likelihood of recurrence of the conduct or offence.
>
> (6) The extent to which a decision not to issue the license would

have a chilling effect on the individual's constitutional rights or the rights of other teachers.

(7) Evidence or rehabilitation, such as participation in counseling, self-help support groups, community service, gainful employment subsequent to the conduct or offense, and family and community support.

2. There is little dispute that Petitioner's conviction would affect students or fellow teachers, but Petitioner's post-conviction activities support a conclusion that no one would be "adversely affected" by Petitioner resuming her teacher profession. All indications are that Petitioner would affect those around her in a positive manner. 515 IAC 1-2-18(h)(1).

3. The offense occurred nearly six years ago. There were no previous incidents and no subsequent infractions. All indications are that the incident was isolated and an anomaly. There was no testimony to rebut a conclusion that the conduct is not likely to recur. 515 IAC 1-2-18(h)(2), (5).

4. Petitioner was teaching and working with secondary school students, all of whom were reported to be shocked at Petitioner's arrest. Petitioner's subsequent activities as a care giver and nursery school teacher indicate her presence poses no danger to students of tender years. It follows she poses no danger to school-aged students. 515 IAC 1-2-18(h)(3).

5. The incident was isolated, as noted above. In addition, her sentence was minimal, she completed all terms of her probation, and she voluntarily sought counseling. Her personal life had never affected her professional life. Her subsequent activities, including her admission of responsibility for her actions, support a conclusion that Petitioner accepts her responsibility in this matter. She has tremendous positive support from her family, employers, church and community. No one spoke in opposition to her Petition for Reinstatement. 515 IAC 1-2-18(h)(4), (7).

6. No constitutional rights, privileges or immunities are implicated in this matter, and Petitioner makes no such claim. 515 IAC 1-2-18(h)(6).

Discussion

In In the Matter of C.R.C. Cause No. 940419067 (IPSB 1994), the Indiana Professional Standards Board made its initial wade into the murky waters of "character" and "reputation" as these related to "fitness." In that decision, the IPSB stated:

"There is distinction in meaning between character and reputation. A person's character depends upon the attributes which he in reality possesses, while his reputation depends upon the attributes which the people generally in the community believe him to possess." Bills v. State, 119 N.E. 465 (Ind. 1918); Wolf v. State, 166 N.E. 883, 885 (Ind. App. 1929); Bay v. Oregon State Board of Education, 378 P.2d 558, 561-2 (Ore. 1963).

"The proper education of the youth of this country by precept and example is one of the most delicate and important functions of the state, and it is not an arbitrary exercise of power to require that those persons intrusted with such education should themselves possess a good moral character." Odell v. Flaningam, 179 N.E. 823, 826 (Ill. 1931); Watson v. State Board of Education, 22 C.A.3d 559, 565 (Cal. App. 1971). See particularly I.C. 20-10.1-4-4, which requires each public and nonpublic school teacher to present his instruction "with special emphasis on honesty, morality, courtesy, obedience to law,...the dignity and necessity of honest labor and other lessons of a steadying influence, which tend to promote and develop an upright and desirable citizenry...."

C.R.C. was denied a teacher license, his academic qualifications notwithstanding, because the testimony and documents provided at his hearing were made by people who were unaware of his past activities which had a direct bearing on his fitness to teach. (fraudulent transcript, forged teacher certificate, accepting a teacher position under false representation of licensure).

Petitioner herein likewise provides abundant--and uncontradicted--testimonials regarding her "character" and "reputation" as these related to her fitness. However, unlike C.R.C., her witnesses and declarants are fully aware of her past legal difficulties. This, coupled with the responsibility of the Administrative Law Judges to assess her credibility and demeanor, supports the recommendation that the purposes of the sanctions in revoking her license have been satisfied, and that further sanctions would be punitive rather than remedial. 515 IAC 1-2-18(j). Petitioner has no illusion that license reinstatement will enable her to resume teaching any time soon. She will always have to explain her conviction and prove herself. The Indiana Professional Standards Board cannot assist her in this regard, but she should not be further sanctioned.

ORDER

Petitioner's Teacher License is to be reinstated, effective the date of the decision by the Indiana Professional Standards Board.

/s/ Dr. Ena Shelley
Dr. Ena Shelley
Administrative Law Judge

/s/ Kevin C. McDowell
Kevin C. McDowell
Administrative Law Judge

ACTION BY THE INDIANA PROFESSIONAL STANDARDS BOARD

The Indiana Professional Standards Board, at its meeting of August 16, 1996, by a vote of 13-0 with two abstentions, adopted the decision of the Administrative Law Judges.

Appeal Right

Any party disagreeing with the decision of the Indiana Professional Standards Board can seek judicial review from a civil court with jurisdiction, but must do so within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4-21.5-5-5.

Indiana Professional Standards Board

"Setting standards for the preparation and licensing of educators"

251 East Ohio Street, Suite 201 - Indianapolis, IN 46204-2133
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BEFORE THE INDIANA
PROFESSIONAL STANDARDS BOARD
Cause No. 951128085

In the Matter of B.A.	)	
Teacher License No. 548740	)	Before Dr. Lewis Ciminillo and
	)	Kevin C. McDowell,
Revocation of License Action	)	Administrative Law Judges
I.C. 20-6.1-3-7 and 515 IAC 1-2-18(b)	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

The State Superintendent of Public Instruction, by counsel, initiated this action on November 28, 1995, seeking to revoke the Indiana Teacher license of Respondent, who while a teacher in Kentucky plead guilty to Mail Fraud, 18 U.S.C. §1341, and Bank Fraud, 18 U.S.C. §1344. The State Superintendent's complaint asserts that Respondent's activities constitute immorality and misconduct in office, either of which may serve as a basis for license revocation under I.C. 20-6.1-3-7(a)(1), (2) or 515 IAC 1-2-18(b). Kevin C. McDowell, General Counsel, Indiana Department of Education, was appointed on November 30, 1995, as one of the Administrative Law Judges (ALJ); Dr. Lewis Ciminillo, member of the Indiana Professional Standards Board (IPSB), was appointed on December 5, 1995, as the other ALJ.

A Notice of Appointment and Advisement of Hearing Rights was provided the parties on December 11, 1995. A hearing date was set for January 17, 1996. On January 4, 1996, the State Superintendent requested a continuance of the January 17, 1996, hearing date. A continuance was granted on January 9, 1996. The hearing was reset for March 20, 1996.

On January 10, 1996, the State Superintendent moved to amend her complaint. This

Motion was granted on January 16, 1996. The Amended Complaint was filed.

The State Superintendent, on March 14, 1996, requested a continuance of at least sixty (60) days because of the unavailability of certain documents related to the Respondent's convictions. The hearing was continued to June 21, 1996.

Prehearing Conference

The hearing was conducted on June 21, 1996. Petitioner appeared by counsel. Respondent appeared in person and by counsel. A prehearing conference was conducted prior to the hearing. Respondent submitted four exhibits, which consisted of a letter of recommendation from the principal/executive director of Lutheran High School, Indianapolis; a letter of reference from the principal of Hardinsburg Elementary School, Hardinsburg, Ky.; a letter of reference from the superintendent of Breckinridge County Schools, Hardinsburg, Ky.; and Respondent's resume. Petitioner objected to the hearsay nature of the documents, which was noted. However, the documents were received into the record.

Petitioner submitted the following exhibits:

A-1: Indictment, U.S. District Court, Western District of Kentucky, involving respondent.

B-1: Judgment in criminal case, same court, involving respondent.

C: Per curiam decision, U.S. Court of Appeals for the Sixth Circuit involving respondent.

D: Joint Appendix, U.S. Court of Appeals, involving respondent.

E. Respondent's application for an Indiana Teaching License, dated September 9, 1991.

F. Respondent's Indiana Teacher License No. 548740.

G. Lutheran High School Teacher Handbook.

H. Letter from S.W., widow of T.R.W.

I. 18 U.S.C. §§1341-1344.

J. Kentucky Summary Record of Teacher Certification.

In addition, Petitioner requested the ALJs take official notice of I.C. 20-6.1-3-7 (license revocation and suspension), I.C. 20-10.1-4-4 (Morals Instruction), I.C. 20-10.1-4-4.5 (Good

Citizenship Instruction), and 515 IAC 1-2-18 (IPSB license revocation regulation).[1]

Respondent did not object to these documents. These exhibits were admitted to the record.

Sworn testimony was taken. All parties were afforded ample opportunity to present evidence and cross examine opposing witnesses. Based on testimony and evidence, the following Findings of Fact are determined.

Findings of Fact

1. Respondent was issued a lifetime teaching certificate in 1974 from the Kentucky Department of Education.
2. Respondent taught in the Breckinridge County (Ky.) school system from 1970 to 1991. He was regarded as a good teacher and was apparently well respected by his colleagues.
3. Respondent was treasurer of the Breckinridge Teachers Credit Union in 1989 and 1990 when he engaged in schemes to defraud insurance companies and the credit union by utilizing the account of a fellow teacher and family friend who had died. Respondent also completed paperwork and approved a false loan for a person who did not apply for the loan and did not receive the proceeds.
4. Respondent was indicted on May 23, 1991, by a federal grand jury on one count of mail fraud and one count of bank fraud.
5. Respondent plead guilty to these charges on July 18, 1991, and was sentenced on September 23, 1991, to serve a three-month concurrent commitment for both counts in a federal prison, to be followed by three-month community-service obligation at the Volunteers of America facility in Indianapolis. Overall, Respondent was to have a two-year period of supervised release after imprisonment.
6. On October 2, 1991, Respondent appealed the sentence to the Sixth Circuit Court of Appeals, claiming in part ineffective assistance of counsel.

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[1]As will be noted, the activities which resulted in this revocation action occurred in Kentucky in 1991. Official notice under I.C. 4-21.5-3-26(f) is within the ALJs' discretion. The ALJs take official notice of the statutes and regulations except I.C. 20-10.1-4-4.5 (Good Citizenship Instruction) because this law did not exist until 1995.

7. The execution of respondent's sentence was stayed on October 24, 1991, pending completion of the appeal.

8. On April 24, 1992, a three-member panel of judges from the 6th Circuit affirmed the district court's sentence. The court's decision, which contains a more particular history of the underlying charges, is made a part of this decision and marked as "Attachment A."

9. After pleading guilty to the aforementioned charges but before the court sentenced him on September 23, 1991, the Respondent applied for an Indiana Teaching License. It cannot be determined when Respondent applied. Respondent asserts he applied on September 9, 1991, while the file copy of his application shows a date stamp of September 30, 1991. He answered in the negative to the application question "Have you ever been convicted of a felony?" An Indiana license was issued on October 1, 1991, and expires October 1, 1996. The license number is 548740. The discrepancy in the date stamp may be attributable to a delay occasioned by later receipt of the processing fee. There was no testimony from a first-hand witness with information regarding the application.

10. Respondent's personal and professional lives deteriorated during imprisonment and thereafter. He has worked for the Indiana Department of Environmental Management (1992-1994) in a mail room capacity. He then worked for the Marion County Office of Family and Children from 1994-1995 as a caseworker. In August 1995, Respondent assumed his present teaching responsibilities with Lutheran High School in Indianapolis, where he teaches sophomore composition and literature as well as all levels of French. A letter of recommendation was received from the principal of the school, but the letter does not indicate the principal is aware of respondent's past indiscretions and resulting felony convictions. Respondent also has a part-time job as a parking lot attendant.

11. The Commonwealth of Kentucky has not revoked Respondent's original teacher certification.

Conclusions of Law

1. Respondent did not provide a false answer on his Indiana teacher license application. Respondent's testimony regarding when he applied (September 9, 1991) was more

credible in this regard. On September 9, 1991, Respondent had not been convicted of a felony, although he had plead guilty to Mail Fraud and Bank Fraud.

2. Respondent's past conduct, when balanced with the many professional accolades, does not constitute "immorality" such as to justify revocation. See Discussion below.

3. Respondent's past conduct constitutes "misconduct in office." An admired, respected and trusted teacher, Respondent was elected treasurer of the teacher's credit union. Respondent betrayed this trust. See Discussion below.

4. Indiana can revoke or suspend an Indiana teacher license predicated on activities occurring outside this State.

Discussion

A license can be revoked for immorality, misconduct in office, incompetency, or willful neglect of duty. I.C. 20-6.1-3-7; 515 IAC 1-2-18(b). In this matter, the revocation action is premised upon "immorality" and "misconduct in office," but these terms are not defined in statute or regulation, although some guidance is provided in regulation. For example, charges could be based upon obtaining a license through material misrepresentation or fraudulent means; having a license revoked or suspended in another state; or conviction of as misdemeanor or a felony which directly relates to the ability to perform one's teaching duties. These latter offenses may "include crimes of moral turpitude...or the issuing of false statements." 515 IAC 1-2-18(b)(1)-(3).

Nonetheless, "immorality" and "misconduct in office" are vague standards. Judicial applications serve to provide more practical understanding.

In Indiana Board of Pharmacy v. Haag, 111 N.E. 178 (Ind. 1916), the Indiana Supreme Court addressed the issue of license revocation for "gross immorality." The court first defined "immorality" (without the qualifier "gross") as "inconsistent with rectitude," "contrary to conscience or the divine law," "wicked," "unjust," "dishonest," "vicious," and that which is "hostile to the welfare of the general public." At 180.

The court did not find "gross immorality" to be too indefinite, uncertain or vague "for determining the moral qualifications of the person to be intrusted with a license." Id.

Haag involved a pharmacy license. Cases involving teacher licenses are consistent in finding that disciplinary actions can be based upon acts of "immorality" and that the term is not unconstitutionally vague. A reasonable teacher of ordinary intelligence, utilizing common understanding, would know that such an act of "immorality" would be likely to become known to the general student population, reflect a poor example to the students, and place one's professional position in jeopardy. See Nanko v. Department of Education, 663 A.2d 312, 315 (Pa. Cmwlth. 1995); Barringer v. Caldwell County Bd. of Education, 473 S.E.2d 435 (N.C. App. 1996). There is an eight-step analysis of "immorality" as this relates to revocation or suspension of a teacher's license which often appears in teacher license cases:

1. Likelihood that the conduct may have adversely affected students or fellow teachers;
2. The degree of such anticipated adversity;
3. The proximity or remoteness in time of the conduct;
4. The type of teaching certificate held by the party involved;
5. The extenuating circumstance, if any, surrounding the conduct;
6. The praiseworthiness or blameworthiness of the motives resulting in the conduct;
7. The likelihood of the recurrence of the conduct; and
8. The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

Morrison v. Bd. of Education, 461 P.2d 375 (Cal. 1969). This analysis appears in substantially similar form at 515 IAC 1-2-18(h)(1) - (7), adding an additional step: evidence of rehabilitation, such as participation in counseling, self-help support groups, community service, gainful employment subsequent to the conduct or offense, and family and community support.

"Misconduct in office" is a less precise term with no particular analysis distinct from "immorality," "moral turpitude," "unprofessional conduct" and such. However, it is a separate basis for revocation or suspension of a teacher license, and has been raised in this matter.

> In ordinary usage, "misconduct" is "mismanagement [especially] of governmental or military responsibilities," or a "deliberate violation of a rule of law or standard of behavior

> [especially] by a governmental official," see *Webster's Third New International Dictionary* 1443 (1981) (unabridged); "[b]ehavior not conforming to prevailing standards or laws," see *The American Heritage Dictionary of the English Language* 838 (1969); "[a] transgression of some established and definite rule of action,...a dereliction from duty," see *Black's Law Dictionary* 999 (6th ed. 1990).

United States v. Gears, 835 F.Supp. 1093, 1099-1100 (N.D. Ind. 1993).

On August 26, 1996, the Indiana Court of Appeals issued a decision which provides further assistance in defining "misconduct." In Bonnell v. Sabbagh, 670 N.E.2d 69 (Ind. App. 1996), the Court rejected the argument that negligent or careless acts constitute "misconduct" of officials (in this case election officials). The court indicated that "fraud" and "misconduct" have "in common a mental element" which involves intentional and willful conduct. Id., at 72.

Respondent in this case, when applying the analysis for "immorality," has not engaged in conduct that would be considered as such to support a revocation or suspension of a teacher license. However, Respondent's activities as the elected treasurer of the teacher's credit union constitute "misconduct in office." Respondent's activities were not the result of mere negligence or carelessness, but were willful and intentional acts to defraud.

The IPSB is not limited to revocation only but may choose to suspend a license for "misconduct in office." In Re L.A.N. Cause No. 940826074 (IPSB 1995). The L.A.N. case is instructive here. L.A.N. was a teacher who enjoyed the same professional respect as Respondent herein, who had more compelling reasons for his indiscretion, whose crime was not as serious as Respondent's crimes, but who received a two-year suspension of his Indiana license.

Respondent's conduct may not be best addressed by revocation, but a one-year suspension for this misconduct in office is warranted.

Recommended Order

Respondent's Indiana Teacher license No. 548740 is to be suspended for one (1) year from the date the Indiana Professional Standards Board adopts this decision.

/s/ Kevin C. McDowell, ALJ
Date: September 26, 1996

/s/ Dr. Lewis Ciminillo, ALJ
Date: September 26, 1996

ACTION BY THE INDIANA PROFESSIONAL STANDARDS BOARD

The Indiana Professional Standards Board, at its meeting of November 21, 1996, and following oral argument, upheld the decision of the Administrative Law Judges by a unanimous voice vote with one abstention.

Appeal Right

Any party aggrieved by the decision of the Indiana Professional Standards Board may seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from the receipt of this written decision, as provided by I.C. 4-21.5-5-5.